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ORIGINAL

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

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IN THE MATTER OF THE APPLICATION OF ARIZONA PUBLIC SERVICE COMPANY FOR APPROVAL OF ITS 2014 RENEWABLE ENERGY STANDARD IMPLEMENTATION PLAN FOR RESET OF RENEWABLE ENERGY ADJUSTOR

DOCKET NO. E-01345A-13-0140

RESPONSE TO ARISEIA AND TASC MOTIONS TO DISMISS

In deciding APS's 2014 REST budget, the Commission concluded that "it would be more prudent to wait until the second quarter of 2014 to determine whether or not the final 30 MW at the Redhawk facility are actually needed for compliance purposes."[1] APS's April 15 Application and subsequent Supplemental Application procedurally created the forum for the Commission to act on this language. Despite this history, TASC and AriSEIA file procedurally improper motions to dismiss.

The Motions are improper because no rule authorizes their filing and no standard exists to assess their validity. Equally important for assessing the Motions' merit is the reason the Motions were filed in the first place. TASC and AriSEIA seek to delay consideration of APS's DG proposal until after September 2014 in the hopes that doing

[1] Decision No. 74237 at P 37 (January 7, 2014).

so will prevent the project entirely. It is clear that solar leasing companies only want more solar if they can own it. They have claimed in numerous dockets that APS has not gone far enough with solar. But when confronted with a rooftop solar proposal that will serve a market segment these third parties will not serve—customers with less than perfect credit—the proposal is attacked with an "everything but the kitchen sink" strategy. But this strategy only raises policy questions better suited for the Commission's legislative function, rather than adjudicative questions that require a declaration of rights based upon pre-existing legal obligations.

APS respectfully requests that the Motions to Dismiss be denied because the Motions only raise policy considerations. APS further requests that they be considered as Comments to APS's Applications that the Commission can consider as it typically considers Comments.

I. The Procedural Issues Raised by the Motions Ignore the 2014 REST Order, Mischaracterize APS's Applications and Otherwise Lack Merit.

In Decision No. 74237, the Commission decided to evaluate the remaining 30 MW of APS's previously-approved AZ Sun program in 2014, stating:

> We think it would be more prudent to wait until the second quarter of 2014 to determine whether or not the final 30 MW at the Redhawk facility are actually needed for compliance purposes.[2]

TASC and AriSEIA ignore this language, and instead repeatedly assert (in various forms) that APS's Applications somehow collaterally attack Decision No. 74237. But their assertions ignore the Decision's conclusion to determine the need for the final 30 MW of AZ Sun during "the second quarter of 2014." If this language is to have any meaning, APS's Applications are not only permissible, but imperative. It is not clear why Decision No. 74237 also prescribed what Commission Staff will evaluate in the connection with APS's 2015 REST Plan. Perhaps the Commission envisioned a broader policy discussion and wished to make sure that the discussion occurred in the 2015 REST docket, even if some decision had been reached in the interim. What is clear is

[2] Decision No. 74237 at P 37.

that (i) the only language in Decision No. 74237 discussing when the Commission would decide the need for the last 30 MW of AZ Sun states that the decision will occur in 2014, and perhaps as soon as the second quarter of 2014; and (ii) the timeline to procure the remaining 30 MW of AZ Sun would require a final Commission decision well before the Commission's decision regarding APS's 2015 REST Plan.

What TASC and AriSEIA also ignore is that *the Commission can approve the final 20 MW of AZ Sun without changing a single word in Decision No. 74237.* APS's Applications only implicate prospective revenue recovery. They would not reopen or change the 2014 REST budget or the 2014 REST adjustor. Independent of the Applications, Staff can discuss AZ Sun in its 2015 REST recommendations. The only outcome that is inconsistent with Decision No. 74237 is if the Commission did not consider AZ Sun at all in 2014.

Further, TASC and AriSEIA raise no actual prejudice implicated by their claimed "collateral attack" on Decision No. 74237. They only raise hypothetical harms that are themselves undermined by the language in Decision No. 74237 inviting APS's Applications and a decision in 2014. As further evidence that their procedural smoke screen lacks merit, none of the procedural issues raised by TASC and AriSEIA would have even hypothetical merit if APS had filed its Applications in the 2015 REST docket and sought expedited treatment. Doing so would have precluded any need to discuss whether AZ Sun should be resolved in the 2015 REST docket, and would have resulted in the same expedited timeframe currently driving the Applications. Any procedural harm that can be entirely resolved by simply changing a docket number is no harm worthy of a motion to dismiss.

II. Without an Authorizing Rule or Guiding Standard, the Motions Should be Treated as the Policy-Oriented Comments that they Are.

The Motions to Dismiss do not cite to any rule permitting the dismissal of a policy proposal. Nor do they cite to a standard against which their claims can be assessed. Instead, the Motions raise a series of policy-related questions—issues that can

only be resolved in a legislative forum. Legislative actions traditionally involve discretionary policy decisions with prospective implications,[3] whereas "a judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed to already exist."[4] Under this standard, the Motions raise only legislative questions.

For instance, the Motions reference cost uncertainty—an issue that the Commission considers in each annual REST docket. Resolving cost uncertainty is a legislative function. The Commission decides each year whether to approve REST programs with the benefit of only estimated costs. Similarly, the Motions raise the question of whether APS should own residential rooftop solar at all. But this is the quintessential policy question (one that has already been answered, in fact). Answering this question is a discretionary act, with prospective application, that could never be resolved in an adjudicative forum.

The fact is that APS's two applications only raise policy issues—whether and how APS should own residential rooftop solar. And they were filed in a policy forum—APS's 2014 REST docket—a docket that has always been policy-oriented in nature. There was no basis for TASC and AriSEIA to file their Motions to Dismiss. Nor is there any basis for the Motions to be granted. Instead, TASC and AriSEIA's delay tactic should be rejected, and the Motions should be treated as Comments, similar to the Comments that parties typically file in REST dockets.

III. Whether APS Needs More Energy to Meet its Obligations is a Policy Question for the Commission, not an Issue for a Motion to Dismiss.

APS will never be able to secure exactly 1,700,000 MWh of extra renewable energy on December 31, 2015. The only question is how much above that energy target APS should plan for. APS promised in its 2009 rate case settlement to exert best efforts

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[3] *See Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 220 Ariz. 587, 594, ¶ 18, 208 P.3d 676, 683 (2009) (citations omitted).

[4] *Ariz. Corp. Comm'n v. Superior Court*, 107 Ariz. 24, 26-27, 480 P.2d 988, 990-91 (1971) (citations omitted).

to procure the extra 1,700,000 MWh, and the Commission went further, ordering APS to procure the extra energy.[5] An additional 20 MW of AZ Sun is a reasonable amount of capacity to ensure that APS will achieve compliance, but not greatly exceed the end of 2015 energy target. And since APS may soon have to procure additional DG to comply with the REST rules, all of the energy produced by the 20 MW of AZ Sun will count towards compliance requirements one way or another.

If APS did not install the 20 MW of AZ Sun, APS would be forced to rely upon the efforts of third parties to achieve compliance. But in light of known risks to those third parties—such as the U.S. Treasury Department and Internal Revenue Service's investigations into the activities of TASC's parent company (the largest third-party rooftop solar installer in Arizona)—it would be inappropriate for APS to assume that third parties will continue to install solar at today's pace. To ensure compliance with the Commission's order, and to fulfill APS's obligations to the parties who signed the 2009 rate case settlement, APS does not believe it should delegate its responsibilities to the market. Whether the Commission agrees is a policy decision that should be decided in Open Meeting as part of the Commission's legislative function.

IV. If TASC and AriSEIA Truly Wanted More Information, They Would Submit Discovery, Not File Motions to Dismiss.

In the wake of APS's April 15, 2014 filing, TASC and AriSEIA did not file any Comments, seek discovery or otherwise raise any concerns regarding the last 20 MW of AZ Sun. And upon receiving APS's Supplemental Application, they once again have declined to propound any data requests to APS. Despite this silence, both now insist that APS's Application must be delayed so that more information can be gathered. This disconnect between claiming to want information, but not even asking for it, suggests the presence of a hidden motive: the desire to delay approval of AZ Sun DG beyond the procurement-driven deadline of September 2014.

[5] *See* Decision No. 71448 at p. 61 and Exhibit A at P 15.1.

A. Sufficient information to assess AZ Sun DG has been provided through data requests.

Commission Staff, by contrast, has sought a significant amount of discovery regarding AZ Sun DG. Staff has submitted three sets of data requests to APS on all aspects of the program, and RUCO has similarly sought this information. Staff has not yet made its recommendation, but a significant amount of information has been provided regarding APS's proposal. In fact, the amount of information provided is similar to the amount of information provided in connection with any APS proposal. The Commission may always conclude that it needs even more information. But in light of information provided in data requests, TASC and AriSEIA's claims about a lack of information no longer have any weight, and would not justify dismissing APS's proposal with prejudice in any event.

B. A.A.C. R14-2-1813(B) only applies to REST implementation plans.

TASC and AriSEIA also point to the information required by A.A.C. R14-2-1813(B)(1), (B)(2), (B)(4) and (B)(5), claiming that APS must provide that information with its Applications. But neither party acknowledges that A.A.C. R14-2-1813(B) only applies to REST implementation plans. Indeed, the categories of information called for in (B)(1), (B)(2), (B)(4) and (B)(5) only make sense in the context of an implementation plan: (i) renewable energy resources to be added over the next five years in (B)(1); (ii) the cost of each resource proposed in the plan in (B)(2); (iii) a proposal evaluating the recovery of costs for complying with the REST rules in (B)(4); and (iv) a line item budget allocating funding for each type of resource described in the implementation plan in (B)(5). Because APS's Applications are not implementation plans, the requirements of R14-2-1813(B)(1), (B)(2), (B)(4) and (B)(5) do not apply. And given the data provided to Staff and RUCO, the issue of whether APS complied with R14-2-1813 is now moot anyway. All of the information referenced in R14-2-1813(B) that is relevant to AZ Sun DG has been provided.

C. If the information referenced in the Motions to Dismiss is critical to protect customers, solar leasing companies should provide it too.

A final issue related to the insistence for more information is that TASC and AriSEIA think this information is needed in the first place. TASC and AriSEIA assert that the Commission cannot move forward with a 20 MW rooftop solar project unless the Commission carefully considers various issues, including landlord/tenant disputes, customer access, damage to rooftop systems, damage to roofs, adjudication of disputes, scheduling maintenance, decommissioning, inverter replacement, insurance, production levels, rooftop fires, home ownership transfers and so on. APS has already successfully dealt with these issues in Flagstaff. But the Motions claim that these are new issues, and that the Commission must understand them before moving forward to avoid risks to customers, increased costs to non-participating customers and other complications.

If all of these issues pose such serious risks to APS customers, perhaps third-party solar leasing companies should be required to provide this information as well.

When third parties install electricity generating facilities on customer rooftops, issues of customer access, damage to rooftops, customer access, dispute resolution, rooftop fires and many others arise. Solar leasing companies may claim that they are different because they assume the cost of these risks. But most of the issues raised in the Motions are not about risk and cost sharing, but about consumer protection: treating customers fairly, having transparent rules that do not discriminate and ensuring that customers have an available regulator (one that can be accessed without expensive legal help) that can resolve disputes quickly and fairly. TASC and AriSEIA's insistence that more information is needed does do not warrant a dismissal with prejudice. But it does raise the question of whether this information is sufficiently important to warrant the Commission insisting that leasing companies provide the same information.

D. With customers funding solar leasing companies through the cost shift, solar leasing company costs should be provided to the Commission too.

The cost concerns raised by TASC and AriSEIA similarly prompt the potential need to understand the business of solar leasing companies. The Commission has

recognized that net metering shifts costs onto customers without DG.[6] Those TASC and AriSEIA members that are solar leasing companies rely upon this cost shift for their business model. The higher the costs avoided through a net metered system, the higher the lease payments they can charge to customers installing net metered systems while still offering a financially attractive transaction. In this fashion, solar leasing companies effectively pass their costs onto non-DG customers through the cost shift.[7] They now insist that the Commission must understand various cost and return-on-equity issues related to AZ Sun DG because customers hold ultimate financial responsibility for APS projects. But customers without DG are ultimately responsible for paying the cost shift. If the Commission must understand cost-related issues for one rooftop solar model funded by utility customers, they must understand cost-related issues for all rooftop solar models funded by utility customers.

V. Claims of Unfair Competition are Transparent Attempts to Delay and Block Competition.

There have been five utility-owned rooftop solar programs approved in the state of Arizona.[8] None of them have slowed down the rooftop solar market, much less inflicted the permanent harm suggested by TASC and AriSEIA. Indeed, it has been quite the opposite. Third-parties own or have installed approximately 420 MW of rooftop solar in APS's service territory, and residential applications for new DG continue at a healthy pace. Now these same third-parties describe grave concerns if APS installs a rooftop solar program limited to 20 MW.

But these 20 MWs *will actually be built by third parties*, not by APS.

And AZ Sun DG will be available to customers with less than perfect credit—a market segment that the market has failed to serve.

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[6] *See* Decision No. 74202 at P 21 (December 3, 2013).

[7] Unlike net metered rooftop solar, AZ Sun DG would not involve a cost shift. The cost shift occurs when participating customers avoid fixed costs, and non-participating customers pay for those avoided costs in the form of higher rates. *See* Decision No. 74202 at P 21 (December 3, 2013). By contrast, AZ Sun DG (like all APS generation) will be paid for by all APS customers and benefit all APS customers.

[8] Three of the programs are APS-owned: the two School and Government programs and the Community Power Project. The other two projects are owned by Tucson Electric Power Company.

In the end, concerns about so-called "unfair competition" are more about blocking perceived competition themselves, rather than expressing legitimate legal objections to APS's filings.

There is another reason why the Motions to Dismiss raise no legitimate concern regarding the rooftop solar "market": the cost shift. As described above, solar leasing companies are funded by utility customers through the cost shift. Without that subsidy, and the cash grants and tax credits provided by the federal government, these companies could not do business. Yet they now claim to represent the "free market." They do not. They represent—and are dependent upon—tax and electricity rate subsidies. In contrast, APS has assumed the responsibility of public service with an obligation to serve all customers, and has accepted a limited return on equity. Solar leasing companies have no such responsibilities, regulatory oversight or limitations.

Assertions in the Motions to Dismiss regarding the need to prevent unfair competition simply ring hollow. The question is not how to preserve a "free market" for rooftop solar. That "free market" has never existed. Instead, the question is how to expand rooftop solar in a fair and sustainable manner. This question is a policy issue for the Commission to consider in its legislative capacity.

VI. Conclusion

The Motions to Dismiss cannot be granted because there is no standard to assess their validity. Moreover, the Motions do not advance any issue that warrants dismissal. Instead, they raise policy questions that can only be addressed by the Commission in its legislative function. Finally, any procedural issues raised by the Motion misread Decision No. 74237, and would disappear entirely if APS had filed its Applications in the 2015 REST docket, or if the 2014 and 2015 REST dockets were consolidated. Any procedural harm that can be solved by changing a docket number is no harm worth the Commission's attention. APS requests that the Motions for Dismiss be denied, to the extent a denial is needed, and instead be treated as Comments to APS's Applications.

RESPECTFULLY SUBMITTED this 3rd day of September 2014.

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